

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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CAPITOL RECORDS, LLC, *et al.*, :
:
Plaintiffs, : 07 Civ. 9931 (WHP)
v. :
:
MP3TUNES, LLC and MICHAEL ROBERTSON, :
:
Defendants. :
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**DEFENDANT ROBERTSON'S MEMORANDUM OF LAW IN SUPPORT OF HIS
MOTION IN LIMINE REGARDING THE ORDER OF PROOF AT TRIAL**

Defendant Michael Robertson (“Robertson”) submits this memorandum of law in support of his motion *in limine* regarding the order of proof at trial. Claims against MP3tunes, LLC (“MP3tunes”) should be severed from claims against Robertson and decided by the Court after the claims against Robertson. Moreover, no reference to the claims against MP3tunes should be permitted during the trial against Robertson.

The reason for such relief is simple. MP3tunes is in Chapter 7 bankruptcy and will default at trial. As a result, the claims against MP3tunes must be decided by the Court on a motion for default.

Trial of the claims against MP3tunes should not be permitted to infect the proceedings against Robertson, especially since this Court denied Robertson’s motion for summary judgment with respect to Robertson’s potential secondary and/or vicarious liability for any damage claims against MP3tunes. *Capitol Records, Inc. v. MP3tunes, LLC*, 2013 WL 1987225, at *9-11 (May 14, 2013). Robertson would be seriously prejudiced if Plaintiffs are permitted the illusion of trying their claims against MP3tunes at the same time that they are actually trying their claims against Robertson. In essence, “MP3tunes” will be providing no rebuttal to Plaintiffs’ claims and evidence and such matter will be viewed by the jury as uncontested.

This Court plainly has power to sever the claims against MP3tunes and have those claims decided after the jury decides the claims against Robertson. *See Johnson v. Mortham*, 915 F.Supp. 1574, 1581 (N.D. Fla. 1996) (“it is also well established that a trial court has broad discretion to exercise control over the order of presentation at trial”); *accord* Fed. R. Evid. 611(a) (“The court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence”).

Nor is there any prejudice from such a procedure. As noted above, Plaintiffs have no right to a jury determination of the claims against MP3tunes since MP3tunes will default. *Offei v. Omar*, 2011 WL 4448954, at *1 (S.D.N.Y. Sept. 20, 2011) (“the overwhelming weight of case-law authority holds that a default based on inaction by the defendant deprives all parties of any preexisting right to a jury”).¹ After the verdicts are returned with respect to the claims against Robertson, the Court can decide the claims against MP3tunes in light of the verdicts on the claims against Robertson.

CONCLUSION

For all the foregoing reasons, Plaintiffs’ motion *in limine* regarding the order of proof at trial should be granted.

Dated: New York, New York
September 18, 2012

Respectfully Submitted,

AKERMAN SENTERFITT LLP

By:s/Ira S. Sacks

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¹ In fact, the right to a jury trial suggests that Robertson’s case must proceed before claims against MP3tunes were to be resolved. *Accord Dollar Sys., Inc. v. Avcar Leasing Sys., Inc.*, 890 F.2d 165, 170 (9th Cir. 1989) (“where there are issues common to both the equitable and legal claims, the legal claims involved in the action must be determined prior to any final court determination of [the] equitable claims”) (quotation marks and citation omitted).

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